

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 3, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1578-CR

Cir. Ct. No. 2011CF146

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SUSAN E. KRUEGER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., Gundrum, J.

¶1 PER CURIAM. Susan E. Krueger appeals from a judgment of conviction for operating a motor vehicle while intoxicated as a third offense with a minor child in the vehicle, entered upon her guilty plea following the trial court's

denial of her suppression motion. Krueger also appeals from an order denying her postconviction motion without a hearing. We affirm.

¶2 In 2011, Krueger was stopped by police for speeding. Krueger's two minor children were in the back seat of the car. During the traffic stop, Officer Joshua Krick began to suspect that Krueger was intoxicated. Krick eventually arranged for additional officers to assist with Krueger's children so that he could transport Krueger to a warm, dry place for field sobriety testing. About forty-five minutes after the initial stop, Krueger was transported to a nearby hospital garage where, after failing field sobriety tests, she was arrested. Krueger filed a suppression motion challenging the scope and duration of the traffic stop. The trial court denied the motion.

¶3 On appeal, Krueger does not challenge the lawfulness of the initial traffic stop or her eventual arrest. Krueger contends that the trial court's factual findings were clearly erroneous and that Krick did not have sufficient reasonable suspicion to extend the traffic stop after completing his speeding investigation or to perform field sobriety tests. Relevant facts will be set forth where necessary in this opinion.

¶4 If, during a valid traffic stop, an officer becomes aware of factors supporting a reasonable suspicion that a separate offense has been committed, the stop may be extended to allow for additional investigation. *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394. The validity of the extension is evaluated under the same criteria as the initial stop. *Id.* Specifically, an officer must possess a reasonable articulable suspicion based on the totality of the circumstances that a crime has been committed. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). Reasonable suspicion is a commonsense test and presents a lower burden

than the probable cause necessary to justify an arrest or search warrant. *State v. Waldner*, 206 Wis. 2d 51, 56, 59, 556 N.W.2d 681 (1996). In considering the totality of the circumstances, our focus is upon the reasonableness of the officers' actions in the situation facing them. *State v. Williams*, 2001 WI 21, ¶23, 241 Wis. 2d 631, 623 N.W.2d 106. "The essential question is whether the action of the law enforcement officer was reasonable under all the facts and circumstances present." *Id.* (citations omitted).

¶5 In reviewing the denial of a motion to suppress, we will uphold the trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *Waldner*, 206 Wis. 2d at 54. Whether those facts satisfy the constitutional requirement of reasonableness is a question of law we review de novo. *Id.*

¶6 The evidence at the suppression hearing consisted of officer testimony and the video recording of the traffic stop captured by the squad car's dashboard camera. Krick testified that he first noticed Krueger because she was driving thirteen miles per hour over the posted speed limit of twenty-five miles per hour. He began to follow her car and activated his emergency lights. Krueger increased her speed and continued driving for another two blocks. She did not pull over until after Krick activated his siren.

¶7 As Krick left his squad and approached Krueger's car, her rear passenger window opened and a bouquet of helium balloons flew out. Krick testified that he asked Krueger for her driver's license and that she appeared flustered and seemed preoccupied with attending to the balloons. Instead of providing her driver's license as requested, Krueger got out of the car to push the balloons back inside. Krick testified that Krueger's gait was unusual in that she

was “hopping or prancing” as she walked around the car. After the balloons were secured in the car, Krueger looked through her purse for her license but was unable to find it. She then “crawled into the seat in the back, then crawled forward to the center console” and “was kind of digging through that.” Krueger resumed looking through her purse and after about two minutes, Krick told her to return to the driver’s seat so he could write down her information. Krick testified that as Krueger was returning to her seat, he “caught a very brief and slight odor, but it was a very distinguishable odor of intoxicants.”

¶8 Krick testified that when Krueger returned to her seat, she would not close the door. Krick testified that he told her to close the door, but that Krueger instead got back out of the car stating she had to find her wallet. Krick testified that he “had to put [his] hand on her shoulder to restrain her from walking out.” Krick testified that during their interactions, Krueger’s speech was deliberate. She told Krick she was coming from the Mineshaft, a restaurant and bar.

¶9 As Krick headed back to his squad to process Krueger’s information, he requested backup. Within minutes, Officer Scott Jagusch arrived. While Krick attended to his paperwork, the officers discussed whether Krueger appeared intoxicated. At Krick’s request, Jagusch went to Krueger’s window to ask for her insurance information and to see if he smelled anything unusual. While running Krueger’s license information, Krick learned that she had two prior OWI convictions. Jagusch returned and told Krick that he did not smell intoxicants, but also noted that it was windy outside and he was congested due to a cold. When asked for his opinion, Jagusch told Krick that, based on his own observations, he would probably release Krueger without performing field sobriety tests. At Krick’s request, Jagusch agreed to perform a horizontal gaze nystagmus (HGN) test, and the officers had Krueger exit and stand behind her car. Jagusch explained

and attempted to perform the HGN test, but was unable to obtain valid results because Krueger repeatedly moved her head contrary to Jagusch's instructions.

¶10 Believing that Krueger's inability to comply might be due to the cold and windy conditions, Krick asked her to instead perform a walk-and-turn field test. After officers explained and demonstrated the test, Krueger got into position but then stopped and asked if the test could be performed at a warmer location, such as the police station. The officers agreed and even offered a closer location about a block away. Because there were two children in Krueger's car, Krick had to arrange for their supervision. It was the end of Jagusch's shift and he needed to report back to the station. Krueger waited in her car for backup to arrive.

¶11 About fifteen minutes later, Officer Leslie Martin arrived. Krick explained the situation and asked if Martin would perform an HGN test on Krueger with the thought of releasing her in the event she passed. Martin testified that when she made contact with Krueger, she "immediately noticed an odor of intoxicants" and observed "red, glassy, bloodshot eyes." Martin observed that Krueger's speech was "very slow" and deliberate. Martin attempted to perform the HGN test, but Krueger was unable to follow her instructions. Similar to Jagusch, Martin testified that she advised Krueger numerous times to keep her head still and that Krueger was unable to comply.

¶12 Based on the evidence at the hearing, the trial court denied Krueger's suppression motion:

Let's look at the specific articulable facts that we[re] relied on by Officer Krick: Those facts include the fact that the Defendant was speeding, 38 in a 25-mile-an-hour limit; an increased 45 miles an hour in a 30-mile-per-hour limit. The failure of the Defendant to immediately pull over her vehicle, an inexplicable opening of the passenger side window allowing balloons to exit, the Defendant's

demeanor in approaching the balloons and insistence about doing something about them, the Defendant's climbing into the car through the front seat into the backseat in order to find her license, which we subsequently discovered was in her wallet that was left at the Mineshaft Tavern. Her admission she was coming from the Mineshaft Tavern, her attempts to get out of the car when instructed by Officer Krick to [stay] there, his knowledge that the Defendant had two prior OWIs. And additionally, the Defendant's failure to comply [with] Officer [Jagusch's] instructions with regards to HGN.^[1]

¶13 We agree with the trial court that the above facts constitute sufficient reasonable suspicion to justify the administration of field sobriety tests. At the time Krueger was asked to exit her car for field sobriety tests, Krick had observed the following articulable factors: (1) Krueger's speeding in an amount fifty percent greater than the posted limit; (2) Krueger's increased speed and delay in pulling over after signaled; (3) the unexplained opening of the window and release of balloons; (4) Krueger's deliberate speech; (5) her unusual gait; (6) the disorganized and prolonged search for her wallet; (6) the fact that she was coming from an establishment that included a bar; (7) the faint odor of intoxicants on a windy evening; (8) Krueger's failure to comply with Krick's directions to get into and remain inside the car; and (9) Krick's knowledge of her prior two OWI convictions. Though Krueger asserts that Krick "seemed fixated" on the last factor, the officer was entitled to consider her prior record. *State v. Lange*, 2009 WI 49, ¶33, 317 Wis. 2d 383, 766 N.W.2d 551 (prior OWI convictions are a permissible factor in determining the existence of probable cause for an intoxicated driving offense); *see also State v. Goss*, 2011 WI 104, ¶22 & n.19, 338

¹ Because Jagusch's HGN test came after Krick's decision to perform field sobriety tests, we do not rely on this as a factor in determining the existence of reasonable suspicion. However, this factor is relevant to Krueger's argument that the stop should have concluded after Jagusch's HGN test and will be addressed in that context.

Wis. 2d 72, 806 N.W.2d 918 (clarifying that *Lange* applies outside the context of a probable cause determination and that “regardless of the quantum of evidence needed to satisfy a given standard, a prior conviction may be taken into consideration”). In the present case, though any one of the above facts standing alone might be insufficient to provide reasonable suspicion, their cumulative total “[gives] rise to a reasonable suspicion that something unlawful might well be afoot.” *Waldner*, 206 Wis. 2d at 58.

¶14 We reject Krueger’s assertion that certain of the trial court’s factual findings were clearly erroneous. Krueger argues that the video contradicts Krick’s testimony that Krueger did not immediately pull over after he activated his emergency lights. We have reviewed the video and cannot determine that the trial court’s finding was clearly erroneous. *See State v. Walli*, 2011 WI App 86, ¶17, 334 Wis. 2d 402, 799 N.W.2d 898 (where a trial court’s findings of fact are based on disputed testimony and a video recording, we will apply the clearly erroneous standard in reviewing the court’s findings based on that recording).² The point at which Krick activated his lights is not plainly discernible on the video. As in *Walli*, the trial court’s findings “involved not simply the review of the video, the court also evaluated the credibility of the officer and weighed all of the evidence.” *Id.*, ¶14. For these same reasons, we additionally conclude that the trial court’s finding that Krick smelled a faint odor of intoxicants is not clearly erroneous.

¶15 We also find unpersuasive Krueger’s argument that Jagusch’s testimony undercut the existence of Krick’s reasonable suspicion. It is undisputed

² Our appellate jurisdiction precludes us from making findings of fact where the evidence is controverted. *Wurtz v. Fleischman*, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980).

that Jagusch did not smell intoxicants and told Krick that based on his personal observations, he would release Krueger. However, Jagusch arrived about seven minutes after the initial stop and did not witness any of the actions Krick articulated as the basis for his reasonable suspicion. Jagusch's contact with Krueger lasted "less than thirty seconds," and Jagusch testified that his congestion may have impaired his sense of smell.

¶16 Finally, we reject Krueger's related argument that the stop was unlawfully prolonged and should have been terminated after Jagusch performed the HGN. Krueger asserts that "[o]nce Krick completed his speeding paperwork and Jagusch determined Krueger showed no signs of intoxication, the stop was complete and the officers should have allowed Krueger to leave." While Krueger acknowledges that "[t]here remains no hard-and-fast time limit for when a detention has become too long," *State v. Arias*, 2008 WI 84, ¶34, 311 Wis. 2d 358, 752 N.W.2d 748, she argues that "Krick's extension of the stop in order to wait for unnecessary backup resulted in an unreasonable detention."

¶17 The central flaw in Krueger's argument is that Jagusch's administration of the HGN test did nothing to dispel Krick's reasonable suspicion. Jagusch testified that he attempted, but was unable, to complete the test because Krueger could not keep her head still. Jagusch explained that he had "the option to fail her on that test, but I did not fail her. I just told Officer Krick I couldn't get an accurate reading of her eyes." The trial court noted that Krueger's inability to follow this instruction was visible on the video:

We have got the fact, ultimately, when there is an attempt to perform the HGN by Officer [Jagusch], she doesn't follow instructions and that was noticeable on the DVD. She is turning her head. He keeps telling her, no, don't turn your head. You are turning your head too much. Just

follow the stylus, don't turn your head. It was noticeable.
She continued to turn her head.

¶18 We are unable to discern any point at which Krick's conduct unreasonably intruded on Krueger's liberty. *See id.*, ¶38 (a lawful seizure "becomes unreasonable when the incremental liberty intrusion resulting from the investigation supersedes the public interest served by the investigation"). While Krick and Jagusch were discussing the situation, Krick was "doing a number of things, which included running her information, saving it through a program called E-time ... and then also entering and inputting all of the information for the warnings on a program called Tracks." Thereafter, Krueger's inability to perform the HGN led the officers to attempt the alternative walk-and-turn test. Krueger asked questions and took time to consider her options. She eventually decided to take the test in another location. Because of Krueger's children, Krick required assistance which was delayed due to the weather and shift changes in the department. Upon Martin's arrival, Krick again attempted to quickly confirm or dispel his suspicion without having to transport Krueger. However, Martin's observations concerning the odor of intoxicants, Krueger's glassy bloodshot eyes, and her lack of compliance with the HGN test only added to the existing reasonable suspicion. On the facts of this case, Krick acted diligently using "the least intrusive means reasonably available to verify or dispel [his] suspicion." *Id.*, ¶32 (citations omitted).

The Trial Court properly denied Krueger's postconviction motion without a hearing.

¶19 Krueger filed a postconviction motion which again challenged the scope of the traffic stop. Krueger's postconviction motion was based solely on the facts adduced at the suppression hearing, and did not allege the existence of

additional facts that would require an evidentiary hearing. In a written decision and order, the trial court denied the postconviction motion, explaining that it was “simply a reiteration of the arguments made in support of the Defendant’s [pre-plea] motion to suppress” and that

[a]dditionally, this Court sees no reason to again debate an issue that was the subject of evidentiary hearings, briefs, argument and an oral decision. If the Defendant wishes to challenge this Court’s ruling in her motion to suppress, the Defendant should appeal the same.

¶20 A trial court has the discretion to deny a postconviction motion without an evidentiary hearing if a defendant fails to allege sufficient facts to raise a question of fact, presents only conclusory allegations, or if the record demonstrates that the defendant is not entitled to relief. *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). When reviewing a court’s discretionary act, this court utilizes the deferential erroneous exercise of discretion standard. *State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W.2d 50 (1996).

¶21 The trial court’s summary denial of Krueger’s postconviction motion was a proper exercise of discretion. Krueger did not raise any new facts or allege that trial counsel was ineffective for failing to elicit additional facts or argue different legal claims. She therefore did not allege sufficient material facts which if true would entitle her to relief. *See State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

¶22 Krueger’s central assertion is that her postconviction motion cited precedent and legal arguments not fully developed in the trial court. Whether findings of facts satisfy a constitutional standard is a question of law we review de

novo. **Waldner**, 206 Wis. 2d at 54. Though WIS. STAT. RULE 809.30(2)(h) and § 974.02(2) (2011-12)³ permitted Krueger to file a postconviction motion, she was not required to do so, and the trial court was not required to hold a hearing on preserved legal issues. We are respectful of Krueger’s cautious attempt to avoid any potential claims of forfeiture. This court has fully considered Krueger’s appellate arguments and our opinion does not invoke doctrines of waiver or forfeiture. Though the trial court characterized Krueger’s motion as “in essence” a reconsideration request, it correctly reasoned that Krueger did not allege any new facts requiring an evidentiary hearing. It was within the trial court’s discretion to determine that the record conclusively demonstrated that Krueger was not entitled to relief.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

³ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

